

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TRAVIS L. PETERSON,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 13-cv-05072 RJB

REPORT AND RECOMMENDATION
ON PLAINTIFF'S COMPLAINT

Noting Date: May 23, 2014

This matter has been referred to United States Magistrate Judge J. Richard
Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR
4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,
271-72 (1976). This matter has been fully briefed (*see* Dkt. Nos. 19, 22, 23).

After considering and reviewing the record, the Court finds that the ALJ erred in
her evaluation of the medical evidence by failing to offer specific and legitimate reasons
supported by substantial evidence to reject the opinions of three examining psychologists

1 who concluded that plaintiff had limitations work related functioning—including the
2 ability to perform routine tasks and the ability to withstand pressures in a normal work
3 setting—that would preclude employment.

4 BACKGROUND

5 Plaintiff, TRAVIS L. PETERSON, was born in 1971 and was 37 years old on the
6 alleged date of disability onset, April 1, 2008 (*see* Tr. 48-49, 51). Plaintiff was in special
7 education classes through sixth grade and later obtained his GED with accommodations
8 (Tr. 63-65). He has work experience as a log truck driver and a backhoe/forklift operator
9 (Tr. 69-72). Plaintiff last worked in housekeeping at a casino, but quit because it was
10 “very frustrating” (Tr. 66).

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12 At the time of the hearing, plaintiff was living with two roommates in a house (Tr.
13 51).

14 Plaintiff has at least the severe impairments of “substance abuse and mood
15 disorder (20 CFR 404.1520(c) and 416.920(c))” (Tr. 28).

16 PROCEDURAL HISTORY

17 On September 2, 2008, plaintiff filed concurrent applications for disability
18 insurance benefits (“DIB”) pursuant to 42 U.S.C. § 423 (Title II) and Supplemental
19 Security Income (“SSI”) benefits pursuant to 42 U.S.C. § 1382(a) (Title XVI) of the
20 Social Security Act (Tr. 195-99). These applications were denied (Tr. 119-20). On April
21 28, 2009, plaintiff again filed applications for DIB and SSI benefits (*see* Tr. 200-02, 203-
22 06). These applications were denied initially and on reconsideration (Tr. 119-22).

23 Plaintiff’s requested hearing was held before Administrative Law Judge Laura Valente
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1 (“the ALJ”) on March 1, 2011 (*see* Tr. 44-118). On April 13, 2011, the ALJ issued a
2 written decision in which the ALJ concluded that plaintiff was not disabled pursuant to
3 the Social Security Act (*see* Tr.22-43).

4 On November 28, 2012, the Appeals Council denied plaintiff’s request for review,
5 making the written decision by the ALJ the final agency decision subject to judicial
6 review (Tr. 3-8). *See* 20 C.F.R. §§ 404.981, 416.1481. Plaintiff filed a complaint in this
7 Court seeking judicial review of the ALJ’s written decision on February 5, 2013 (*see* Dkt.
8 Nos. 1, 3). Defendant filed the sealed administrative record regarding this matter (“Tr.”)
9 on July 18, 2013 (*see* Dkt. Nos. 14, 15).

10 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Whether the
11 ALJ properly evaluated the medical evidence; (2) Whether the ALJ properly evaluated
12 plaintiff’s testimony; (3) Whether the ALJ properly evaluated the lay evidence; (4)
13 Whether the ALJ properly assessed plaintiff’s residual functional capacity; and (5)
14 Whether the ALJ erred by basing her step four and step five findings on a residual
15 functional capacity assessment that did not include all of plaintiff’s limitations (*see* Dkt.
16 No. 19, p. 1).

17 STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
19 denial of social security benefits if the ALJ's findings are based on legal error or not
20 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
21 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
22 1999)).
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DISCUSSION

(1) Whether the ALJ properly evaluated the medical evidence.

Plaintiff argues the ALJ erred in rejecting the opinions of several examining psychologists who opined that plaintiff had marked limitations in multiple areas of work related functioning. Dkt. No. 19, pp. 3-8. The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion an examining psychologist. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). Even if an examining psychologist’s opinion is contradicted, that opinion can be rejected only “for specific and legitimate reasons that are supported by substantial evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by “setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating [her] interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). In addition, the ALJ must explain why her own interpretations, rather than those of the doctors, are correct. *Reddick*, 157 F.3d at 725 (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

A. Mary G. Mangione-Lambie, Ph.D.

Plaintiff argues the ALJ erred by failing to discuss fully examining psychologist Mary G. Mangione-Lambie, Ph.D.’s opinion that plaintiff had marked limitations in

1 multiple areas of work related functioning, including the ability to perform routine tasks
2 and respond appropriately to and tolerate the pressure and expectations of a normal work
3 setting (Dkt. No. 19, p 3-5; see Tr. 555-61). Dr. Mangione-Lambie defined a marked
4 limitation as causing a very significant interference with basic work activities (Tr. 555).
5 Dr. Mangione-Lambie's opinion is important to the ALJ's ultimate non disability
6 determination because the vocational expert ("VE") testified that the inability to perform
7 routine tasks and the inability to withstand the pressures of a normal work setting would
8 probably preclude any employment (Tr. 117).
9

10 Dr. Mangione-Lambie evaluated plaintiff in March of 2009 and completed a
11 clinical interview and mental status examination ("MSE") (Tr. 555-61). Plaintiff
12 exhibited abnormalities on MSE including constricted or odd affect, confused thought
13 processes, and concrete, limited judgment and insight (Tr. 557, 559). Dr. Mangione-
14 Lambie observed plaintiff was easily confused, needed questions repeated or clarified and
15 appeared at times to be responding to internal stimuli (Tr. 557). Dr. Mangione-Lambie
16 questioned plaintiff regarding his history of drug and alcohol abuse and was aware that
17 plaintiff was charged with driving under the influence ("DUI") in 2007 (Tr. 557, 561).
18 Plaintiff reported to Dr. Mangione-Lambie that he was in outpatient treatment for the
19 DUI and that he had been sober for approximately two years (Tr. 557, 61). Based on her
20 examination, Dr. Mangione-Lambie diagnosed schizophrenia and opined plaintiff had
21 marked limitations in multiple areas of work related functioning (Tr. 556-57).
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1 At step two of the sequential evaluation, the ALJ rejected Dr. Mangione-Lambie's
2 diagnosis of schizophrenia because this diagnosis was undercut by Dr. Mangione-
3 Lambie's determination that there was no indication of current drug or alcohol abuse,
4 when other evidence in the record suggested plaintiff was using alcohol and marijuana
5 (Tr. 29, *citing* 82-83, 533, 556-57). For this reason, the ALJ found schizophrenia was not
6 a medically determinable, severe impairment (Tr. 34). The ALJ concluded instead that
7 plaintiff had the severe impairments of substance abuse and mood disorder (Tr. 28). The
8 ALJ did not discuss Dr. Mangione-Lambie's evaluation at any subsequent step of the
9 sequential evaluation process nor offer any other reason to reject the functional
10 limitations opined by Dr. Mangione-Lambie (Tr. 25-37).
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12 The Commissioner argues that the ALJ properly rejected Dr. Mangione-Lambie's
13 opinion regarding plaintiff's functional limitations, because Dr. Mangione-Lambie was
14 unaware of plaintiff's concurrent marijuana and alcohol use. Dkt. No. 22, pp. 8-9. The
15 evidence regarding plaintiff's marijuana and alcohol use during the relevant period is
16 contradictory. For example, plaintiff testified that he quit drinking while completing
17 court ordered drug and alcohol treatment following his 2007 DUI (Tr. 54-55, 82; *accord*
18 346-47, 378, 388, 505-08, 557). In 2007, plaintiff's primary care provider commented on
19 plaintiff's court ordered treatment and opined that plaintiff appeared to be in a great deal
20 of denial regarding his alcohol use (Tr. 341). In 2009, plaintiff reported to an emergency
21 room physician that he drank alcohol occasionally (Tr. 419). In 2011, plaintiff reported
22 that he drank alcohol once a month (Tr. 533).
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1 Similarly, plaintiff testified in 2012 that he smoked marijuana only one time since
2 completing treatment for the DUI (Tr. 83). However in 2010, plaintiff asked his mental
3 health provider to help him get a medical marijuana card because plaintiff felt marijuana
4 worked better than prescribed medication (Tr. 487). During a 2011 psychological
5 evaluation, plaintiff admitted to using marijuana daily for a period of ten years ending in
6 2009 or 2010 (Tr. 533). At the same evaluation, however, plaintiff reported stopping
7 marijuana use after his DUI (Tr. 533).

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9 As the Commissioner points out, state agency reviewing psychologist Cynthia
10 Collingwood, Ph.D., opined plaintiff's psychotic symptoms "may well have been
11 substance induced rather than from bipolar or schizophrenia" (Tr. 406). And in 2011,
12 consultative examiner Cheryl Hart, Psy.D., diagnosed plaintiff with polysubstance
13 dependency (Tr. 537). Therefore, because Dr. Mangione-Lambie's opinion was
14 contradicted by Dr. Collingwood's opinion, the ALJ was required to set forth specific and
15 legitimate reasons, supported by substantial evidence in the record. *See Lester*, 81 F.3d at
16 830-31.

17 Weighing both the evidence that supports and that which detracts from the ALJ's
18 conclusion, a reasonable mind might accept as adequate the reason offered by the ALJ,
19 that Dr. Mangione-Lambie was unaware of plaintiff's concurrent substance use, for
20 discounting Dr. Mangione-Lambie's diagnosis of schizophrenia. *See Andrews*, 53 F.3d at
21 1039 (9th Cir. 1995) (*citing Magallanes*, 881 F.2d at 750).
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1 However, regardless of the etiology, Dr. Mangione-Lambie's opinion regarding
2 plaintiff's symptoms and limitations (schizophrenia or substance induced psychotic
3 disorder), was based on objective findings in the MSE and first hand observations of
4 plaintiff during the examination. *See* Paula T. Trzepacz and Robert W. Baker, *The*
5 *Psychiatric Mental Status Examination 4* (Oxford University Press 1993) ("Like the
6 physical examination, the Mental Status Examination is termed the *objective* portion of
7 the patient evaluation.")(emphasis in original). To reject these limitations because they
8 may have been caused by substance abuse instead of schizophrenia is improper because
9 the ALJ found at step two that substance abuse was a severe impairment (Tr. 28). An
10 ALJ "must consider limitations and restrictions imposed by all of [plaintiff's]
11 impairments, even those that are 'not severe'". Social Security Ruling ("SSR") 96-8p,
12 1996 WL 374184 *5. For this reason, the ALJ did not provide a specific and legitimate
13 reason supported by substantial evidence to reject the opinion of Dr. Mangione-Lambie
14 regarding plaintiffs functional limitations. *Lester*, 81 F.3d at 830-31.

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17 B. Kristi Breen, Ph.D. and Richard Washburn, Ph.D.

18 Plaintiff also argues that the ALJ improperly rejected the medical opinions of
19 examining psychologists Drs. Breen and Washburn who opined that plaintiff had marked
20 to severe limitations in a variety of work related activities including the ability to respond
21 appropriately to and tolerate the pressures and expectations of a normal work setting (Tr.
22 347-48, 464-65). Dr. Breen also opined that plaintiff would have marked limitations in
23 the ability to perform routine tasks (Tr. 348). In these reports, a marked limitation is
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1 defined as a very significant interference with the individual's ability to perform basic
2 work related activities (Tr. 346, 463). As discussed previously, these limitations are
3 significant because the VE testified that the inability to perform these activities would
4 preclude employment (Tr. 117).

5 The ALJ offered two reasons to reject the opinions of Drs. Breen and Washburn:
6 (1) their conclusions relied on plaintiff's complaints without reference to objective
7 medical findings, and (2) their reports indicated plaintiff was not currently using drugs or
8 alcohol, which was contradicted by other evidence in the record (Tr. 35). Neither reason,
9 however, is a specific and legitimate reason supported by substantial evidence necessary
10 to reject the testimony of an examining psychologist. *See Lester*, 81 F.3d at 830-31.
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12 The first reason offered by the ALJ -- that Drs. Breen and Washburn relied on
13 plaintiff's complaints without reference to objective medical findings -- is not supported
14 by the record. Both Drs. Breen and Washburn conducted MSE's and noted
15 abnormalities including concentration difficulties, communication difficulties, poor
16 problem solving ability, poor decision making ability, poor ability to follow directions,
17 some difficulty maintaining mental set, limited/poor insight and borderline estimated
18 intelligence (Tr. 348, 350, 469). The Court notes that "experienced clinicians attend to
19 detail and subtlety in behavior, such as the affect accompanying thought or ideas, the
20 significance of gesture or mannerism, and the unspoken message of conversation. The
21 Mental Status Examination allows the organization, completion and communication of
22 these observations." Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental*
23 *Status Examination 3* (Oxford University Press 1993). "Like the physical examination,
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1 the Mental Status Examination is termed the *objective* portion of the patient evaluation.”
2 *Id.* at 4 (emphasis in original).

3 A mental health professional is trained to observe patients for signs of their mental
4 health not rendered obvious by the patient’s subjective reports, in part because the
5 patient’s self-reported history is “biased by their understanding, experiences, intellect and
6 personality” (*id.* at 4), and, in part, because it is not uncommon for a person suffering
7 from a mental illness to be unaware that her “condition reflects a potentially serious
8 mental illness.” *Van Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) (citation
9 omitted). “When mental illness is the basis of a disability claim, clinical and laboratory
10 data may consist of the diagnosis and observations of professional trained in the field of
11 psychopathology. The report of a psychiatrist should not be rejected simply because of
12 the relative imprecision of the psychiatric methodology or the absence of substantial
13 documentation.” *Blankenship v. Bowen*, 874 F.2d 1116, 1121 (6th Cir. 1989) (*quoting*
14 *Poulin v. Bowen*, 817 F.2d 865, 873-74 (D.C. Cir. 1987) (*quoting Lebus v. Harris*, 526
15 F.Supp. 56, 60 (N.D. Cal. 1981))).

17 In addition to the MSEs, both Drs. Breen and Washburn conducted psychological
18 testing. Dr. Breen administered two tests, the Burns Anxiety Inventory (“BAI”) and the
19 Burns Depression Inventory (“BDI”) (Tr. 352-54). Plaintiff’s scores on these tests
20 indicated a moderate to severe level of depression and anxiety (Tr. 349). Dr. Washburn
21 administered the Burns Mood Survey (Tr. 468). Plaintiff’s score on this survey indicated
22 the need for treatment (Tr. 469). Dr. Washburn also noted in his report that he observed
23 plaintiff’s depression and anxiety symptoms first hand during the examination (Tr. 463).
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1 The record supports that Drs. Breen and Washburn relied on objective measures to form
2 their opinions regarding plaintiff's functional limitations. The ALJ's rejection of this
3 evidence, based on plaintiff's subjective complaints, was improper.

4 The ALJ also rejected the opinions of Drs. Breen and Washburn because their
5 assessment that plaintiff was not currently using drugs or alcohol was contradicted by
6 other evidence (Tr. 35). The ALJ concluded that the marked anxiety symptoms observed
7 by Dr. Washburn during his evaluation could be explained by plaintiff's substance abuse
8 (Tr. 35). This is not a specific and legitimate reason supported by substantial evidence
9 necessary to reject the testimony of an examining psychologist. *Lester*, 81 F.3d at 830-
10 31.
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12 Although this rationale, in conjunction with Dr. Collingwood's opinion that
13 plaintiff's psychotic symptoms could be attributed to substance use and Dr. Hart's
14 diagnosis of polysubstance dependency, may have been sufficient to reject Dr.
15 Mangione-Lambie's diagnosis of schizophrenia, it is not sufficient to reject the functional
16 limitations opined by Drs. Breen and Washburn. No doctor attributed plaintiff's anxiety,
17 depression, or cognitive symptoms to plaintiff's alcohol and marijuana use. Also, as
18 discussed previously, it is improper to reject a functional limitation because it is
19 attributable to substance abuse when substance abuse has been determined to be a severe
20 impairment. *See* SSR 96-8p, 1996 WL 374184 *5.
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22 For these reasons undersigned recommends the ALJ's decision be reversed and
23 remanded for reevaluation of the medical evidence.
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(2) **Whether remand is necessary for consideration of new evidence.**

Plaintiff requests that this Court consider new evidence regarding the qualifications of consultative examiner Dr. Hart. Dkt. No. 19, pp. 13-14, Attachment #1. Pursuant to sentence six of 42 U.S.C. § 405(g), the Court may remand a claim for additional evidence to be taken before the Commissioner upon a showing that the new evidence is material and there is good cause for the failure to incorporate the evidence into the record in a prior proceeding. Here, plaintiff has not established good cause. For this reason, remand for consideration of plaintiff's new evidence is not appropriate.

CONCLUSION

The ALJ erred in evaluating the medical evidence, as the ALJ failed to provide specific and legitimate reasons supported by substantial evidence necessary to reject the opinions of three examining psychologists.

Based on these reasons, and the relevant record, the undersigned recommends that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further consideration. **JUDGMENT** should be for **PLAINTIFF** and the case should be closed.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).

1 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the
2 matter for consideration on May 23, 2014, as noted in the caption.

3 Dated this 30th day of April, 2014.

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6 J. Richard Creatura
7 United States Magistrate Judge
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